IN THE SUPREME COURT OF MISSOURI

No. SC92574

STEPHEN REUTER,
Respondent,

v.

MISSOURI SECRETARY OF STATE ROBIN CARNAHAN and MISSOURI STATE AUDITOR THOMAS A. SCHWEICH,
Appellants,

MISSOURIANS FOR RESPONSIBLE LENDING and JAMES BRYAN,
Appellants,

and

GEORGE SHULL AND JERRY STOCKMAN,
Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

BRIEF OF RESPONDENT REUTER

STINSON MORRISON HECKER LLP
Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
230 W. McCarty Street
Jefferson City, Missouri 65101
573.636.6263
573.636.6231 (fax)
chatfield@stinson.com
kheisinger@stinson.com

Attorneys for Respondent Reuter

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JURISDICTIONAL STATEMENT

Respondent Reuter agrees with the jurisdictional statement of Appellants Secretary of State Carnahan and State Auditor Schweich.

STATEMENT OF FACTS

Respondent provides the following facts that are not included in Appellants' briefs.

A. Initiative Petition 2012-066

Appellant James J. Bryan submitted a sample sheet to the Secretary of State for an initiative petition proposing amendments to Chapters 367 and 408.[1] L.F. N 23-27; L.F. R 121-125.[2] Bryan claims the purpose is stated therein and includes:

> (1) Reducing the annual percentage rate for payday, title, installment and other high cost consumer credit and small loans from triple-digit interest rates to thirty-six percent per year;
>
> (2) Extending to veterans and others the same thirty-six percent rate limit…

Jt. Ex. 1; Bryan Br. at 7-8.

Appellant Bryan's proposed summary statement to the Secretary followed this same outline, asking first whether "Missouri law [should] be amended to: (1) Reduce the

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[1] All statutory references in this Brief are to the Revised Statutes of Missouri (2000) or to the 2011 Cumulative Supplement if located therein.

[2] Legal file references in this Brief will include references to both the Northcott case (SC92500) and the Reuter case, as undersigned counsel are counsel in both cases on appeal. The "N" is for the Northcott legal file, the "R" for the legal file in Reuter.

annual interest rate for payday, title, installment, and other high cost consumer credit and small loans from triple-digit interest rates to 36%?" L.F. R 126; L.F. N 236. Appellant Bryan admits in his brief that one reason he proposed to "reduce the annual interest rate…to 36%" is dissatisfaction with the current statutory limit of interest and fee charges of 75% of principal for consumer loans. Bryan Br. at 6 (citing § 408.505.3).

B. The Auditor's Fiscal Note and Fiscal Note Summary

1. The Auditor's "normal" procedures in preparing fiscal notes and fiscal note summaries

The Auditor's normal policy in preparing a fiscal note is to send copies of the proposed measure to state and local governmental entities requesting information regarding the entities' estimated costs or savings for the proposed measure. Section 116.175 states that proponents or opponents *may* submit a proposed statement of fiscal impact to the Auditor within ten days of the Auditor's receipt of the proposed measure from the Secretary. The Auditor never posts fiscal note requests, and because his office only recognizes submissions "in terms of a proponent or opponent," neither "solicits" nor "takes" "public comments" on proposed fiscal notes. Tr. 17:1-10.[3]

Despite the Auditor's enforcement of section 116.175's requirement that only an avowed "proponent" or "opponent" may make a proposed fiscal impact submission to him, the Auditor admits that he ignores the ten-day deadline found in the same statute. Pl. Ex. 9, p. 15. He has further admitted he does not review proponents or opponents

[3] Unless otherwise indicated, all transcript references are to the March 27, 2012 hearing.

submissions of statements of fiscal impact to ensure they comply with the Governmental Accounting Standards Board standards as required by section 116.175. *Id.* In addition, he has admitted he does not rely on or follow 15 CSR 50-5.010, the regulation promulgated by him that purportedly governs submission of proposed statements of fiscal impact. *Id.*

The Auditor's normal policy is to review the submissions of state and local governmental entities, along with the submission of proponents and opponents of the proposed measure for completeness and reasonableness. Jt. Stip. ¶ 20-21. The Auditor's review for completeness consists of making sure that the entity's response conveys a complete representation of what the entity intended to send and is reasonably related to the proposal and to the suggested fiscal impact reported by the entity. Jt. Stip. ¶ 22. If the Auditor has any questions regarding the submissions from other entities, the Auditor may follow up with that entity. *Id.* If the Auditor finds a response to be unreasonable, that affects the weight given to that response in preparing the fiscal note summary. *Id.* The Auditor does not review proponents and opponents submissions to ensure they meet the requirements for submission as required by statute. Pl. Ex. 9, p. 16. In creating fiscal notes, the Auditor includes the submissions verbatim, if possible, and makes as few changes thereto as is practical. Jt. Stip. ¶ 23. The Auditor's normal policy is to take into account all submissions and draft the fiscal note summary based upon the fiscal note. Jt. Stip. ¶ 24.

The fiscal note and fiscal note summary are prepared by a single individual in the Auditor's office, and are not substantively reviewed by any other individual. Tr. 15. No

matter what the response of state and local government entities and proponents or opponents, the Auditor includes it in the fiscal note, even if the responses are contradictory, irrelevant or nonsensical. Tr. 21-22. The current Auditor is unaware of why the Auditor's office long ago decided to simply paste submitters' responses into the fiscal note verbatim, "no matter what they say." Tr. 21:4-25. Although there is a specific regulation relating to the proposed statements of fiscal impact, the Auditor does not follow the regulation. Tr. 14.

The Auditor uses subjective judgment in deciding whether to follow up on a response. Tr. 74:20-75:13. This process "does not at any point require the Auditor to summarize or explain his analysis," (Bryan Br. at 33), and indeed, does not even require the Auditor to perform "his own independent analysis" at all (*Id.* at 40). *See also* Tr. 95:16-20 (the Auditor did not do "any independent analysis" in preparing "the actual wording for the fiscal note summary"). Instead, the Auditor simply decides to "summarize" the points he "believe[s] are important for the public." Tr. 84:11-13.

2. Preparation of the Fiscal Note and Fiscal Note Summary for the Initiative Petition

The proposed measure was sent to all state governmental entities the Auditor has on file. Jt. Ex. 3. The proposed measure was not sent to all local governmental entities. *Id.* The proposed measure was only sent to certain local governmental entities, at the discretion of the Auditor. *Id.*; Tr. 18. Only six of the sixteen local governmental entities responded to the Auditor. *Id.;* Tr. 166. Dr. Joseph Haslag submitted a proposed

statement of fiscal impact to the Auditor as an opponent of the proposed measure. Jt. Ex. 3; Pl. Ex. 7.

Dr. Haslag's submission suggested that as a result of the proposed measure, payday and title loan stores would close and there would be substantial costs to both state and local government entities. Jt. Ex. 3; Pl. Ex. 7. Dr. Haslag opined that there would be decreases in Missouri gross domestic product, Missouri general revenues, and both state and local licensing fees collected. *Id.* Dr. Haslag also indicated there would be costs to the state as a result of increased unemployment insurance benefits. *Id.* Dr. Haslag estimated total costs as a result of the proposed measure (based on closure of payday and title lending stores) would be $13.65 million in Year 1 and $3.6 million in Year 2. *Id.* Attached to Dr. Haslag's report was also an analysis from the Division of Finance. *Id.*

The Division of Finance stated the proposed measure would put payday and title lenders out of business. *Id*. The response also indicated that the proposed measure would put half of the "510 lenders" out of business, estimating the loss in revenue for all three groups at $675,000. *Id*.

The Auditor found Dr. Haslag's analysis to be reasonably complete and accurate. Tr. 24-25. Dr. Haslag's submission was included in the fiscal note essentially verbatim. Tr. 24. The Auditor recognized that there were internal conflicts in the fiscal note, largely due to differences in assumptions made by the entities. Tr. 30-31. The Auditor believed that Mr. Haslag's assumptions, specifically that the proposed measure would cause businesses to close, were correct. Tr. 29-31. The Auditor relied heavily on Dr. Haslag's analysis in preparing the fiscal note summary. Tr. 32-33. He agreed that Dr.

Haslag's analysis did not address any of the fiscal impact on "510 lenders," and conceded that he did not do any independent analysis to determine such impact. Tr. 36.

3. Department of Insurance, Financial Institutions and Professional Registration's response to the Auditor

The Missouri Department of Insurance, Financial Institutions and Professional Registration is the parent organization of the Division of Finance. Despite the Division of Finance's analysis regarding the significant costs of the proposed measure, the Department submitted the following response to the Auditor:

> [The Initiative Petition] will have no cost or savings to the department. If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

Jt. Ex. 3.

Despite its apparent conflict with the response from the Division of Finance attached to Dr. Haslag's submission, the Auditor made no effort to clarify the issue. Tr. 62. The Auditor's staff had a working relationship with the Department, as it has with all agencies. Tr. 77:25-79:8. The Auditor's designee merely spoke with an agency employee about how a private party was able to sunshine the agency's internal communications, but he made no effort to follow up on the Division of Finance analysis or ask it if was true. Tr. 62:8-63:19. Indeed, the Auditor admitted that he performed no independent analysis whatsoever. Tr. 36:1-9.

4. The Auditor's Fiscal Note Summary

In the course of preparing the fiscal note summary, the Auditor summarizes the points that he believes are important for the public. Tr. 84. The estimated range of annual lost revenue in the first sentence was taken by the Auditor from Dr. Haslag's numbers. Tr. 38. With respect to local government entities, the fiscal note summary states the impact is "unknown." Jt. Ex. 3. No local government entities indicated the fiscal impact of the proposed measure would be "unknown." Tr. 52; Jt. Ex. 3. Dr. Haslag's submission included estimated losses to certain local government entities. Tr. 52; Pl. Ex. 7; Jt. Ex. 3.

C. Pre-Trial Intervention Failure

In September 2011, Appellants Shull and Stockman moved to intervene as of right or, in the alternative, permissively, in the *Prentzler* and *Reuter* cases. L.F. R 1-4. Appellants failed to move to intervene in the *Northcott* or *Francis* cases until months later, and without citation to the record, claim that they did not believe "the industry" would have filed "two more suits." Bryan Br. at 16-17 n.13.

In *Reuter*, the Circuit Court stated that it was inclined to allow Appellants to intervene after a December 12, 2011, argument. 12/12/11 Tr. 12. Throughout this period, Appellants engaged in several abortive attempts to introduce evidence to support their motions to intervene in *Northcott* and *Francis*. Shull Br. at 19. From October 2011 through January 2012, a period of several months, Appellants failed to notice any depositions, not even the deposition of Dr. Haslag, who had submitted the fiscal impact statement to the Auditor as an opponent of the initiative. L.F. R 1-11; L.F. N 1-7 (Docket

sheets covering a several-month period, which shows Appellants served no notice of deposition for Dr. Haslag even when trial was only weeks away).

Mirroring their conduct in discovery, Appellants refused to identify for the Circuit Court at its climactic January 30, 2012 hearing on intervention what additional claims, defenses, arguments, points of proof, or facts they would try to argue at trial. 1/30/12 Tr. 12-17. After Appellants were unable to articulate any additional claim, defense, argument, point of proof, or fact that they would argue at trial, the Circuit Court stated that it would not grant intervention in *Northcott* or *Francis*, and would reverse its earlier rulings allowing intervention in *Prentzler* and *Reuter*. 1/30/12 Tr. 15-17.

On March 26, 2012, the Court of Appeals affirmed the Circuit Court and rejected Appellants' position, and because Appellants failed to seek reconsideration or transfer, a mandate issued. L.F. R 86.

Trial was held on March 27, 2012. As *amici*, Appellants had every opportunity to make legal arguments, and actually proffered oral argument and briefing on all of the issues, both legal and factual. Tr. 250-255. During this time, Appellants neither proffered, nor identified, nor referenced any other facts or factual arguments they would have made through independent witnesses or through cross-examination. *Id.*

Appellants now claim that they would have submitted evidence that would have challenged the core assumptions of the fiscal note itself, arguing that a positive fiscal impact could be expected by capping rates at 36% and shutting down several lending industries. Shull Br. at 33-35. Appellants actually filed such a challenge under section 116.190 and used its existence as an excuse to intervene in the *Prentzler* case, but then

voluntarily dismissed their own challenge. L.F. R 21-22. Appellants neither pled nor filed a proposed pleading asserting any claim or defense that the fiscal note or summary actually understated the positive impact of the petition. L.F. R 28-30; L.F. N 92-99.

D. March 27, 2012 Trial

The trial court tried the cases in a single hearing and on a common record. L.F. R 8; L.F. N 4. The Court heard, without objection, testimony from two experts, Dr. Joseph H. Haslag and Dr. Thomas A. Durkin. Tr. p. 120, *et seq.*; Tr. p. 171, *et seq*. Dr. Haslag's analysis considered only title and payday lenders; Dr. Durkin's analysis also considered installment ("510") lenders. *Id.* Dr. Haslag's economic analysis was undisputed by the Auditor.

1. Payday and Title Lenders

Dr. Haslag used two different methods to conclude that a 36% cap would put all payday and title lenders out of business. First, he researched the internal costs of payday lenders. He calculated the amount of interest that lenders would need to earn in order to stay in business and, using a widely accepted formula, determined that a 36% APR would not come close to covering payday lenders' variable costs. This would force rational lenders to immediately shut down or to go bankrupt. Tr. 125-26; *see* Jt. Ex. 3; Pl. Ex. 7. Second, Dr. Haslag verified his calculations by researching the effects of 36% caps in other states and found that in fact, payday lenders had been forced out of business. Based on an internal Missouri Division of Finance email, he concluded that the same results would apply to title lenders. *See* Jt. Ex. 3; Pl. Ex. 7. The Auditor independently

investigated those conclusions and accepted them as reasonable, complete and accurate. Tr. 24-25. Dr. Durkin also testified that this analysis was reasonable. Tr. 195.

Dr. Haslag next calculated the state GDP contributed by payday and title lenders, which he had reported would be lost if these industries were eliminated. Tr. 126-127. Dr. Haslag calculated the value of the credit provided by payday and title lenders, which, economically, is equal to the amount that lenders receive, and the amount that borrowers pay, for the credit. Jt. Ex. 3; Pl. Ex. 7. This totaled $78.46 million in Year 1 and $79.13 million in Year 2. *Id.*, App. Table B, row 1; Tr. 146. On cross examination, Dr. Haslag testified that capital had flowed into this industry because it is the best use of that capital, and that it could not be assumed that in fiscal Year 1 or 2, there were other Missouri industries with equal rates of return into which the capital would be reinvested. Tr. 132. The Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. Tr. 24-25, 195.

Dr. Haslag then converted the lost GDP into lost tax revenues. Dr. Haslag testified that economists commonly use a figure of 3.8% to determine the total state tax revenues derived from a dollar of state GDP. Tr. 128. Dr. Haslag testified that he had recently used this method to prepare an expert opinion on the fiscal value of the University of Missouri System to the state. Tr. 129. Dr. Haslag concluded that the combined losses from the payday and title industries alone (not including "510 lenders") equaled $2.98 million in Year 1 and $3.01 million in Year 2. Jt. Ex. 3 & Pl. Ex. 7, App. Table B, row 2. The Auditor accepted these conclusions as reasonable and Dr. Durkin's testimony was the same. Tr. 24-25, 195.

Dr. Haslag next calculated the expected loss to the state unemployment compensation fund. First, Dr. Haslag determined the number of payday and title lender employees who would be affected. Tr. 131. He then multiplied this by their expected benefits to reach a total of $8.04 million for payday and $10.08 million for payday and title combined. Tr. 131-32; *see* Jt. Ex. 3 & Pl. Ex. 7, App. Table A and B, row 3. The Auditor found the numbers to be reasonable, but refused to include or mention them in the fiscal note summary because the unemployment compensation fund is not paid from the general revenue fund. Tr. 45-46.

Dr. Haslag testified that the unemployment compensation fund is replenished by taxing businesses, and that assuming that payday and title loan companies left the state, other companies would have to replenish the fund. Tr. 132-35. Further, Dr. Haslag testified that this would itself have a fiscal impact, as corporate income would decrease by the amount of increased payments to the fund. Tr. 134-35. Additionally, Missouri has borrowed money to keep the fund solvent, and interest payments will have to be made to the federal government. Tr. 133. No witness disputed that in fact, there will be a fiscal impact from increased unemployment compensation payouts.

Dr. Haslag also calculated lost license fee revenue to the state using the Division of Finance's internal email and data. Jt. Ex. 3 ; Pl. Ex. 7. He determined that lost license fees totaled $.59 million. *Id.*, App. Table B, row 4. He relied upon the Division of Finance's internal email indicating that the measure "would have a significant fiscal impact" because of license fee losses, even after staff was decreased by "4 or 5 examiners." Jt. Ex. 3; Pl. Ex. 7. The Auditor did not dispute these figures or this

method; however, he considered the report of the Department that houses the Division of Finance, which found "no cost or savings" because the lost revenue would be offset by lower expenses of regulation. Tr. 27-28.

Dr. Haslag testified, in turn, that there was no data to support the Department's disagreement with the Division. Tr. 140-44. In fact, Dr. Haslag testified that it took him only a few moments to calculate that even firing five of the highest-paid employees would not save enough in salary or benefits to come even close to covering the Division's lost revenue. Tr. 140-44. The Auditor's designee could only answer that he did not try to obtain this information from the Department, and his theory of the lost revenue being offset was mere speculation. Tr. 28. Even if, as the Auditor suggested, the entire amount of license revenue losses ($.59 million) could be offset by costs, and therefore offset against the lowest amount of payday and title revenue losses calculated by Dr. Haslag (roughly $3.6 million, the sum of rows 2 and 4 in column 1 of Table B at Pl. Ex. 7 or Jt. Ex. 3), the total lost revenues could be no lower than roughly $3 million. Tr. 145. Nonetheless, the fiscal note summary claims that revenue losses as low as $2.5 million might still be offset by cost reductions. Jt. Ex. 3.

2. "510 Lenders"

Dr. Durkin opined and testified without opposition that the 510 industry would shut down. Tr. 188; Pl. Ex. 14. The loss of these loans, which are primarily used to finance consumer purchases, would have the following effects: reduce state sales tax revenues in Year 1 and 2 by $5.44 million; reduce income tax revenues by $1.2 million in Year 1; reduce state sales tax revenues from former employees due to belt tightening by

$.845 million; increase unemployment compensation by $6.6 million (using Dr. Haslag's methodology); and reduce business income tax revenues by $.504 million. Tr. 189-197. This would lead to a total Year 1 impact of $14.589 million and a Year 2 impact of $5.944 million. Pl. Ex. 14. Based on the calculations of Drs. Haslag and Durkin, total loss to all three industries-payday, title, and installment-was estimated at over $28 million. Tr. 196-97.

3. "Local Impact"

There was significant evidence at trial regarding the local impact of the proposed measure. Evidence was presented reflecting that there would be significant losses to local government entities based on: loss of license fee revenue, loss of earnings tax revenue, loss of sales tax revenue. The Auditor's designee testified, "from Mr. Haslag's information, it was clear...that there would be a local impact." Tr. 90. Dr. Haslag testified that local political subdivisions would have losses of at least $122,000 based on a sampling of two cities that would lose license fee revenue. Tr. 147.

Dr. Haslag testified that his calculations were only for state-level losses, but that business closures would have similar negative fiscal impacts on local government entities. Tr. 151-153. The Auditor understood that Haslag's analysis included losses related to both state income tax and state sales tax. Tr. 86. He also was aware that at least two cities levied a local earnings tax, and neither the fiscal note or fiscal note summary included this local impact. Tr. 53-54, 73.

The Auditor admitted that if, as he accepted as true, there would be lost GDP as a result of the proposed measure, there would also be lost state sales tax revenue. Tr. 64.

Dr. Durkin testified that there would be parallel losses in local sales tax revenue. Tr. 199-200. The Auditor confirmed that there would be a "corresponding impact for local government sales tax revenue." Tr. 69:3-7. The Auditor admitted that the fiscal note and fiscal note summary contained no "local impact" based on loss of local sales tax revenue. Tr. 69.

The Auditor's opposition as to the facts, specifically as to calculations by Drs. Haslag and Durkin, was minimal. The Auditor accepted all of Dr. Haslag's calculations, disagreeing only on the issue of whether unemployment compensation payments constitute a fiscal impact to the state. The Auditor admitted that the fiscal note and fiscal note summary contained no analysis whatsoever of "510" lenders or local impact, and admitted that the fiscal impact would have to increase once "510" lender and local impacts were added to the note. Tr. 62; 69. In his testimony, Dr. Haslag concurred. Tr. 152-53.

E. Judgment of the Trial Court

The trial court issued a single second amended judgment in all four cases. App. A1-A8; L.F. R 156-63; L.F. N 287-94. With respect to the summary statement, the court found the Secretary's summary "insufficient, unfair and likely to deceive voters." App. A3; L.F. R 158; L.F. N 289. The court determined that the exact percentage of the interest rate cap was "required in order for the signers of the initiative and voters to understand the purposes of the Initiative." App. A4; L.F. R 159; L.F. N 290. The court certified a new summary statement as follows:

Shall Missouri law be amended to allow annual rates up to a limit of 36%

including interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

App. A6; L.F. R 161; L.F. N 292.

With respect to the fiscal note and fiscal note summary, the court found both to be inadequate and unfair, remanding them to the Auditor for preparation of a new fiscal note and fiscal note summary. App. A5; L.F. R 160; L.F. N 291. The court found the fact that the measure would cause many businesses to close "undisputed." App. A6; L.F. R 161; L.F. N 292. The court also noted the fact that Dr. Haslag's analysis did not include other types of lenders (in addition to payday and title lenders) that would be impacted by the initiative. *Id.* The court explained that the Fiscal Note itself acknowledged that "510 lenders" would be negatively impacted by the proposed measure. *Id.* The court noted that the Auditor admitted that the fiscal note and fiscal note summary contained no analysis of "510 lenders" or local impact and therefore held the fiscal note and fiscal note summary "insufficiently, unfairly, and significantly underestimate[d] the fiscal impact of the initiative." App. A6-7; L.F. R 161-62; L.F. N 292-93.

F. Post-Trial Intervention

Rev. James J. Bryan and Missourians for Responsible Lending ("Bryan") moved to intervene following the trial on April 9, 2012. L.F. R 100-149; L.F. N 210-260. Judge Green granted their intervention. 4/10/12 Tr. 44. Bryan also filed a motion to stay and/or vacate, which was subsequently denied by the trial court. L.F. R 100-149, 164-169; L.F. N 210-260, 295-300.

INTRODUCTION

This appeal presents an important opportunity for this Court to clarify the standards surrounding the submission of laws to a vote of the people. The Court has not addressed the issues presented herein since at least the 1980's, if at all. Respondent urges the Court to acknowledge the procedural safeguards that protect Respondent, and all citizens, from allowing laws to be enacted by the people without the people having a "full realization of their effects." *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 11 (Mo. banc 1981).

As discussed below[4], the trial court's decision should be affirmed with respect to its rulings on the Secretary's summary statement of the initiative. The trial court should also be affirmed with respect to its ruling that the fiscal note and fiscal note summary of the Auditor must be rewritten. Alternatively, this Court should reverse the trial court's interpretation of law regarding the Auditor's authority to prepare fiscal analysis relating to initiative petitions.

[4] With permission of their counsel, this Brief at times borrows arguments from the briefs of Respondents Prentzler and Francis in Case Nos. SC92573 and SC92571 respectively. When the Brief does so, counsel has attempted to abbreviate rather than restate the entire argument verbatim. Respondent Reuter has also granted Prentzler and Francis counsel permission to borrow from the arguments in this Brief.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE SECRETARY'S SUMMARY STATEMENT IS "INSUFFICIENT, UNFAIR AND LIKELY TO DECEIVE VOTERS" OR IN HOLDING THAT THE SUMMARY STATEMENT IS "INSUFFICIENT AND INADEQUATE" BECAUSE THE SUMMARY STATEMENT IS NOT A SUMMARY STATEMENT WITHIN THE MEANING OF THE STATUTE IN THAT IT FAILS TO SUMMARIZE THE MATERIAL POINTS OF THE INITIATIVE PETITION. (RESPONDS TO STATE'S BRIEF POINT I AND BRYAN'S BRIEF POINT II)

The legislature has imposed upon the Secretary of State an affirmative duty to provide a summary of initiative petitions. Her duty is to "promote an informed understanding by the people of the probable effects" of the initiative. *Buchanan,* 615 S.W.2d at 11. The statute codifies this duty by requiring a 100 word or less "summary" of the initiative (§ 113.334) and by allowing the Courts to review the summary to see if it is either "insufficient" or "unfair." § 116.190. Contrary to the position of the State and the intervenors, the Secretary's duties require more than simple "notice" of what might be in an initiative and the Court's review is not limited to whether the language used is argumentative. Instead, the Secretary has an affirmative duty to provide an accurate and sufficient summary of the measure. In this case, the trial court correctly found that she did not.

A. Standard of review

The applicable standard of review for appeals of court-tried civil cases is found in *White v. Director of Revenue*, 321 S.W.3d 298, 307-308 (Mo. banc 2010), and has been recently reiterated at length in *Pearson v. Koster,* SC92317 (May 25, 2012). The judgment of the trial court will be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *White*, 321 S.W.3d at 307-08 (citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo banc. 1976)). The legislature has provided important procedural safeguards to prevent abuse of the initiative petition process.

Chapter 116 of the Revised Statutes specifies procedures for the placing of an initiative petition on the ballot. This Court has long recognized that procedural safeguards – both those in the Constitution and those created by the legislature -- are important and necessary in the initiative petition process for two reasons "(1) to promote an informed understanding by the people of the probable effects of the proposed amendment; or (2) to prevent a self-serving faction from imposing its will upon the people without their full realization of the effects." *Buchanan,* 615 S.W.2d at 11. See also *Knight v. Carnahan*, 282 S.W.3d 9, 16-17 (Mo. App. 2009), holding that whether "statutory requirements for a validly enacted law [were] followed" is such an important issue that it may be reviewed even thought the measure had already been adopted by a vote of the people. . Two of those important legislative safeguards are the requirement that the Secretary provide a summary of the proposed initiatives and that the Courts review that summary statement. §§ 116.334 and 116.190.

In considering these safeguards, the Courts balance the interests of proponents of the initiative (Intervenors here) in placing their desired law change on the ballot against the rights of the opponents in seeing that the change is not on the ballot unless the citizens make an informed decision to place it there. *Buchanan,* 615 S.W.2d at 11. Intervenors urge this court to place a foot on the scales that balance those interests and abandon the procedural safeguards in favor of a wide and smooth road straight to a vote of the people regardless of whether those signing the initiative have a full understanding of its effects. *See* Shull Br. at 35. Intervenors Bryan and Missourians for Responsible Lending not so subtly urge this court to apply an added standard to review of the statutes and consider the effect it might have on their efforts.[5] Bryan Br. at 60. Although they have not themselves challenged the role of the Secretary or the Auditor in the initiative process, they claim they "relied on" the state officials and that affirming the trial court would "frustrate constitutional objectives." Bryan Br. at 59. To amend the law by initiative petition, "proponent must comply with the amending process prescribed in our Constitution and laws. It is not enough to say that the people have the right" to change

[5] Both intervenors insert non-record information into their briefs. Bryan inserts specific allegations about the number of signatures that have been submitted to the secretary of state and even the allegation that "clergy" were used to gather the signatures. Bryan Br. at 60. None of this is in the record below and it is not proper argument to this Court because it has absolutely nothing to do with the plain language of the statutes, the evidence below or the standard of review.

the law by initiative. *Buchanan,* 615. S.W.2d at 18 (Rendlen, J., dissenting). The Court should ignore the histrionics of Intervenors and reject any back door argument that the statute governing her involvement is unconstitutional. No one has challenged the procedural safeguards of sections 116.334 and 116.190. The sole issue is how to interpret them and apply them in this case. At the end of the day, the analysis of these statutes is no different than any other analysis the Court performs.

1. The Secretary has an obligation to summarize the initiative petition

In order to pass laws by the initiative, the Constitution requires the proponents to obtain a certain number of signatures and to submit those to the Secretary. MO. CONST. art. III, § 50. The legislatively enacted procedure for submitting those signatures requires the proponents to submit signature pages in a certain form that must be approved by the Secretary in advance of circulation. § 116.180. In addition, the Secretary must review the initiative petition and summarize it. § 116.334. The legislature thought this summary was so important in the process that the summary must be placed on each signature page and signatures will not be counted unless the Secretary's summary is on each page in the mandated location. § 116.120.

Because of these statutes, anyone considering whether to sign an initiative petition will see the official ballot title, consisting of the Secretary's short summary of the initiative together with a fiscal impact summary provided by the Auditor. This information is printed on the initiative signature page directly above the place where citizens may sign so that they can read about the initiative before they sign. App. A17; J.

Ex. 1, 6, 11, 16, 21 and 26. The "official ballot title" which includes the secretary's summary and the auditor's fiscal note summary are offered to the voter as an explanation of the effect of the underlying petition. The importance of this summary is self-evident: it is to give the citizens a quick and impartial way to make decisions about whether they want they measure on the ballot. If the Secretary or the Auditor fails in their required duties, those considering whether to sign the initiative do so with incorrect or improper information. In this case, the trial court found that those seeking to sign the initiative would be misled by the official ballot title. App. A5.

2. Citizens have the right to petition the courts for review of the Secretary's summary statement

In addition to the summary requirement, the Legislature has established another safeguard – judicial review. When the Secretary prepares her portion of the official ballot title, the legislature has mandated that her statement be 100 words or less and that the manner of summarizing shall be using language that is not "argumentative" or "likely to create prejudice for or against the proposed measure." § 116.334. The statutory scheme allows the Secretary's summary statement to be reviewed by the Courts upon petition of "any citizen who wishes to challenge" the statement regardless of whether they support or oppose the initiative. § 116.190.[6] The Court reviews the summary to

[6] Intevenor Shull initially filed his own lawsuit under this provision, exercising his own right to challenge the official ballot title, but later dropped that lawsuit in favor of seeking

determine if it is "insufficient or unfair." *Id.* Allowing citizens to challenge the summary statement is an important protection to make sure those opposed to the measure have a sufficient opportunity to challenge the summary that petition signers will see. *Overfelt v. McCaskill,* 81 S.W.3d 732, n.3 (Mo. App. 2002). Of course, it would also allow proponents of an initiative to obtain a fair and sufficient statement if they believe the Secretary or Auditor have failed in their duty.

B. The sufficiency and fairness requirement in section 116.190

Words in a statute are, of course, interpreted using their plain and ordinary meaning. *Utility Serv. Co., Inc. v. Department of Labor and Indus. Relations*, 331 S.W.3d 654, 658 (Mo. banc 2011). A "summary" statement must be a "short restatement of the main points." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (2002). A thing is "insufficient" if it is "inadequate to some designated need or purpose." *Id.* at 1172. Since a summary is to "restate the main points," a summary statement is insufficient if it does not adequately restate the main points of the initiative. The Court of Appeals has used a slightly different, but totally consistent definition of insufficient: "Insufficient means 'inadequate; especially lacking adequate power, capacity, or competence.'" *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. 2006) (quoting *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App.

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intervention in this action below. *George D. Shull et al. v. Thomas Schweich,* 11AC-CC00551 (Cole County Circuit Court, August 19, 2011).

1994)). This plain language approach to the statute is exactly the approach used by the trial court. App. A3-4.

A close review of the statutory language makes clear that the Secretary's obligation in preparing her summary statement is two-fold. § 116.334, App. A29. First, the Secretary must provide a summary. *Id.* In addition, this summary must be in language that is neutral. *Id.* The two-part analysis is clearly reflected in section 116.190's discussion of the factors the court should consider when a challenge has been brought. A challenge may be brought if any citizen considers the statement "insufficient" *or* "unfair." § 116.190. A plain meaning of the statute leads to the conclusion that either insufficiency or unfairness, or both, justify granting a plaintiff's request for a different ballot title. A summary could be invalid if it is insufficient (although it might use words that are not argumentative and unfair) but it could also be re-written because it is sufficient, but uses words that are unfair and argumentative.

Although the plain language of the statute provides the legal standard necessary to analyze the issue in this Point, case law is consistent with the plain language analysis outlined above. The State's brief misstates the standard because it relies on imprecise, often introductory language in Court of Appeal's decisions. Specifically, the state relies on language which changes the "or" separating "insufficient" from "unfair" to an "and." See *Hancock,* 885 S.W.2d at 49 quoted on page 22 of the State's Brief. But a more thorough review of appellate jurisprudence makes clear that Missouri Courts have consistently followed the language of the statute which requires that the summary statement be *both* sufficient *and* fair. State Appellants do not seriously contest that the

test is for both sufficiency and fairness. Indeed, the state draws the distinction in its brief, arguing "there is no bias, prejudice, deception and/or favoritism in the Secretary's language *and* the language makes the subject evident with sufficient clearness." State Br. at 26 (internal quotes omitted).[7]

This two part analysis is the correct standard. The Court of Appeals has acknowledged that the Secretary performs no great feat when she simply fails to deceive the voters. Instead, the statutes place an additional obligation on her: "[i]t is incumbent upon the Secretary in the initiative process to promote an informed understanding of the probable effect of the proposed amendment." *Cures without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. 2008)(citing *Buchanan,* 615 S.W.2d at 11). This obligation is found in the simple meaning of the word "summary" as discussed above. Similarly the Court of Appeals has written that accuracy alone is not the full test, rather the summary must "accurately reflect[] *the legal and probable effects of the initiative*." *Missouri Municipal League v. Carnahan,* 303 S.W.3d 573, 584 (Mo. App. 2010)("*MML I*")(emphasis supplied). This type of language reflects the mandate of *Buchanan* that procedural safeguards such as sections 116.334 and 116.190 must promote an informed understanding of the initiative. To be sufficient, the summary must indeed have "adequate power, capacity, [and] competence.'" *Missourians Against Human Cloning*, 190 S.W.3d at 456.

[7] The State and Intevenors instead urge an incorrect standard of "notice" which will be discussed *infra*.

Prior case law does not address the specific situation the Court faces here – failure to adequately, with power and capacity, summarize the main points of the initiative. Certainly cases have held that the Secretary need not elaborate on every detail of an initiative. *Id*. The statutes do not require great specificity, but they do require an adequate summary. Since there is no dispute that a summary must include the main points, the first issue is not whether the language used was deceptive (although the trial court specifically found it was as will be discussed below) or whether the Secretary could have provided more detail (she most certainly could have as her summary used less than half of the 100 words the legislature allowed for a summary). Instead, the inquiry is whether the summary adequately and with sufficient power contains the main points of the initiative.

C. The trial court found the Summary Statement to be insufficient as a matter "of law and fact"

The trial court found that the "very meaning and purpose" of the initiative was the 36% interest limit. As a matter of "law and fact" the probable effect of the initiative is "not tied to the mere *existence* of a 'limit' but rather, it depends on *what* the 'limit' is. The trial court reached this decision after considering evidence of the language of the initiative itself, testimony from expert witnesses and from the Auditor's office about the effect of the initiative would be. App. A3.

1. There was ample support for the finding of insufficiency

The Court's finding of insufficiency due to the Secretary's failure to advise voters the interest rate would be changed to 36% was well supported by the evidence. The

initiative itself declares the 36% limit to be the purpose of the initiative. Section 408.100 of the initiative advises "it is the intent" of the initiative to "reduce the annual percentage rate for payday, title installment and other high cost consumer credit and small loans from triple digit Interest rates to thirty six percent per year." App. A4. The initiative claims that rates without the new law are "as high as three hundred percent annually" prior to imposing the thirty six percent limit, making clear that a reduction to a set amount is the goal and that the effect of the initiative is to lower the rate to a set amount. App. A10. The proponent and submitter of the initiative to the Secretary summarized his own initiative. His proposed summary for the Secretary identified the important points of the initiative, the first of which was that it would "reduce" the interest rate "to 36%." L.F. R 126; L.F. N 236.

Dr. Joseph Haslag, a professor of economics at the University of Missouri, testified at trial and told the Court that without knowing the interest rate amount, there would be no way to analyze what effect the initiative would have on costs or savings to the State. Tr. 154. The Auditor's office agreed by way of testimony from the official who prepared the fiscal note and fiscal note summary.

The fiscal note summary prepared by the Auditor (which appears on the Official Ballot Title just below the Secretary's Summary) depended on the interest rate being 36% as opposed to some other number. Tr. 34-35. The trial court had the benefit of hearing testimony about the real impact of the initiative when it concluded "as a matter of both law and fact" that the "probable effect" of the initiative depends on "what the 'limit' is." App. A4. Defendants offered no evidence that would support a finding to the contrary.

The trial court's factual determination should not be disturbed unless it is against the weight of the evidence or there is not substantial evidence to support it. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). In this case, all of the evidence supports the trial court finding that the main point of the initiative was the reduction to 36%.

Of course the trial court was right that the interest rate is a critical factor in deciding whether this initiative should be placed on the ballot. When one is asked to agree to an interest rate, the most important factor is what the rate is. The trial court pointed out this logic by briefly referencing state and federal statutes as well as the common law's treatment of interest as a material term in any contract. App. A4. This language appears to be the trial court's way of elaborating upon his own factual finding, but it takes no more than common sense to find that a person considering whether to sign an initiative to place an interest rate cap on the ballot would want to know the actual rate. While a cap of 300% would seem too high to some, a cap of 3% would seem too restrictive to others. Similarly, knowing that the cap is 36% is a critical piece of information which is material and undoubtedly a "main point" of the initiative. The trial court's reference to the common law is particularly insightful. In essence, the Secretary has omitted a material term from the summary such that there cannot be a meeting of the minds without knowing what the interest rate is. *See Wigley v. Capital Bank of Southwest Missouri,* 887 S.W.2d 715, 724 (Mo. App. 1994).

2. The trial court found the Summary Statement to be unfair

For this reason, the court also found that "without an explicit statement of the limit, the Summary is misleading and likely to deceive petition signers and voters." The

phrase "unfair" in 116.190 must also be interpreted using the plain and ordinary meaning as found in the dictionary. If the Summary is "unfair" it is guilty of "providing an insufficient *or* inequitable basis for judgment or evaluation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2495 (2002) (emphasis supplied). Prior jurisprudence acknowledges that a summary statement which is insufficient is also unfair within the plain meaning of those terms. In *Cures Without Cloning v. Carnahan,* 259 S.W.3d at 82, the Court of Appeals upheld the re-writing of a Summary statement, without discussing whether the language was argumentative and likely to create prejudice. Instead, the Court found that a summary was insufficient and unfair because it "does not fairly summarize any goal or effect of the initiative proposal." .

The *Cures* holding is consistent with the ordinary meaning of the words in the statute – failing to summarize makes the summary both insufficient *and* unfair. The holding in *MML I* also takes this approach. A summary of an initiative to change the eminent domain laws required Court intervention and a new summary statement because the summary must "accurately reflect[ ] the legal and probable effects of the initiative." 303 S.W.3d at 584. "To be fair and impartial, the summary should describe [the] changes" made by the initiative." *Id*. at 586. The *MML I* Court did not trouble itself with distinguishing between the words insufficient and unfair in this context, because a summary that fails to do so fails both tests.

3. The trial court was also correct to change the Secretary's word "limit" to "allow"

Although the reasoning is not elaborated upon, the trial Court also changed the Secretary's use of the word "limit" concerning interest rates to "allow." App. A7. The State's appeal seems to abandon this issue, arguing only that the summary was "true" even if it did not contain the interest rate limitation without discussing the other change from "limit" to "allow." Intervenor Bryan does not raise the issue specifically in a Point Relied on, but does include it as a subpart of his argument. Bryan Br. at 58.

The trial Court was correct to make this change because the Secretary's summary told potential signers that the measure would limit interest rates to some unspecified amount. The use of the term "limit" was misleading and inaccurate. By stating that the measure will amend the law "to limit the annual rate of interest, fees and finance charges" the Secretary effectively told voters that under current law, there is no limit on the annual rate of interest, fees and finance charges for loans covered by the measure. This inaccuracy was added to by the failure to disclose the new interest rate would be 36%. A fair reading of the language is that the law will be changed to impose a limit of some amount where none previously existed.

This is simply untrue and therefore misleading. Section 408.140 places significant restrictions on the fees and charges consumer loan companies can charge. These restrictions include the prohibition of any fee or charge not specifically authorized by statute and a cap on the amount of origination, extension and late fees that a consumer lender may charge. By stating that the Initiative Petition would "amend" Missouri law to "limit" the annual rate of interest, fees and finance charges that may be charged for consumer loans, the Summary Statement unfairly misleads petition signers and voters

that such limits do not currently exist and that the initiative is necessary in order to impose any limit.

Misrepresenting to potential petition signers the effect a measure will have when compared with existing law is inadequate and inequitable because it does not inform readers of the probable legal effects of the measure. The issue was squarely addressed by the Court of Appeals in *MML I,* 303 S.W.3d 573. There the Court affirmed the trial court's decision to rewrite a portion of a summary statement because the summary statement incorrectly told potential signers that the initiative would establish a requirement for just compensation upon a taking of property when such a requirement already existed in the law. *Id.* at 588. Without commenting on whether this inaccuracy made the summary "insufficient" or "unfair" or both, the Court of Appeals modified the trial court's summary revision as well as the Secretary's original language. *Id.* Just as it was insufficient and unfair to say that the initiative in *MML* required landowners to receive just compensation because the law already mandated just compensation, it is insufficient and unfair to tell signers this initiative limits fees and finance charges, when the law already imposes such limitations.

D. Notice is not the standard

Ignoring the language of the statute, the State's brief takes the position that the summary statement must only give notice of the subject of the law. State Br. at 25. Intervenor Bryan's brief elaborates on this concept by urging this court to look to clear title cases for guidance. Bryan Br. at 49-50. Bryan further claims it is sufficient for the Secretary to give notice and then to have "individuals . . . look to the proposed law itself

for greater detail about the proposed law's precise provisions." Bryan Br. at 49. This "notice" standard cannot be found in the statutes or in any reasonable interpretation of the words used. Had the legislature meant the Secretary to give "notice," the statute could use that phrase. Instead the statute requires a summary of the measure in up to one hundred words. This Court's holding in *Buchanan* points out that the point of such a safeguard is to promote an informed understanding of the initiative and its probable effects, not simply to give notice and hope citizens can figure it out.

Intervenor Bryan, consistent with his position as a partisan proponent of the initiative, urges the Court to ignore the statutes and look instead to clear title cases for a lower bar. Bryan Br. at 49. Of course, the clear title cases interpret a constitutional provision, not the statutes at issue here. Bryan borrows from those cases and asks that the Secretary's one hundred word summary statement only be required to "indicate in a general way" the type of initiative enacted. *Id.* Bryan goes on to say that "an official ballot title has never been intended to serve as the key source of information for citizens" concerning the initiative. Bryan Br. at 55. Bryan cites to no statutory or case law as authority for this proposition, because there is none. Instead, the statutory requirement that the Secretary summarize the initiative, that the Auditor comment on its fiscal impact and that this information be placed on each and every signature page in a prominent place where signers will review it leads to the opposite conclusion. The official ballot title is not only *intended* to be an important source of information, but as a practical matter it is.

Bryan goes on to analogize his proposed "notice" standard to that of candidate elections. Bryan says that candidates are listed on the ballot solely by name and by party

and citizens must inform themselves if they want to know more. Bryan Br. at 55. Of course, the statutes do require the Secretary to provide more about the candidate, such as an address and the party to which she belongs. § 115.401. Allowing the Secretary to ignore the statutory requirement that she summarize an initiative petition would be no different than allowing her to print a list of candidates without party identification or, more analogous to this case, allowing her to print only part of the name of a candidate, *i.e.,* listing "Mr. Kinder" as a candidate for Lt. Governor without telling voters whether the candidate is Byron Kinder or Peter Kinder.

No doubt there are Court of Appeals cases that mention the "notice" concept in the initiative petition summary statement context, notably *Bergman v. Mills,* 988 S.W.2d 84, 92 (Mo. App. 1999). But these cases, and Appellants' briefs, all trace back to this Court's decision in *Union Electric v. Kirkpatrick,* 678 S.W.2d 402 (Mo. banc 1984) and *Union Electric v. Kirkpatrick,* 606 S.W.2d 658 (Mo. banc 1980). The problem is the *Union Electric* cases were not challenges to the procedural requirements of the legislature, but rather challenges to the Constitutional requirements concerning a single subject being expressed in a title. Those cases pre-date the statutes at issue here. More important, they analyze a completely different standard. Nevertheless they continue to be cited in cases and in briefs of the State. *See* State's Brief at 24, citing *Missourians Against Human Cloning* (quoting *Union Electric*, 606 S.W.2d at 660). The legislature did not direct the Secretary to simply provide notice of the subject of the initiative and direct the voters to the initiative itself. Rather the language of the statute is more specific and requires a summary that is both sufficient and fair. This Court is well familiar with the clear title

and single subject cases. *See, e.g., Trout v. State,* 231 S.W.3d 140 (Mo. 2007). The point of the Constitutional provisions discussed in those types of cases is indeed to give "notice," not to "summarize" the content of the measure. No one can seriously argue that a title like that discussed in *Trout,* "relating to ethics" even made an attempt to summarize the measure.

II. THE TRIAL COURT DID NOT ERR IN CERTIFYING THE COURT-WRITTEN SUMMARY STATEMENT PORTION OF THE OFFICIAL BALLOT TITLE TO THE SECRETARY OF STATE IN THAT THIS IS THE ONLY ACTION THE TRIAL COURT IS AUTHORIZED TO DO BY SECTION 116.190 WHEN A SUMMARY STATEMENT IS DETERMINED BY THE TRIAL COURT TO BE INSUFFICIENT OR UNFAIR. (RESPONDS TO STATE'S BRIEF POINT II)

A. Separation of powers

The State's brief claims a Court may not re-write an insufficient summary statement due to the doctrine of separation of powers. Issues regarding the constitutional validity and construction of state statutes are reviewed *de novo* by this Court. *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 604 (Mo. banc 2010). Article II, section 1 of the Missouri Constitution provides:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with

> the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

This provision "has always been liberally construed. The word 'properly' is taken as meaning solely or exclusively." *Clark v. Austin*, 101 S.W.2d 977, 987 (Mo. 1937)(en banc). "In practice, the functional lines between . . . political departments are not hard, impenetrable ones. There is a necessary overlap between the functions of the departments of government." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). Violation of separation of powers can occur in two ways: (1) when one branch interferes impermissibly with the other's performance of its *constitutionally assigned power*; or (2) when one branch assumes a power that more properly is entrusted to another. *Id.*

Neither of these types of violation has occurred in this case.[8] The authority to write a summary statement is not a duty imposed on the Secretary by the Constitution, so no violation can occur under the first type. Nor has there been a violation under the second type because the judiciary is only rewriting that portion of the summary statement that was in excess of any discretionary authority granted to the Secretary by statute.

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[8] Appellants Carnahan and Schweich do not state in their Brief that there are two types of violation and do not state which one they assert is applicable. State's Br. at 27-35. It leaves Respondent no choice but to brief this Court generally as to the two types and then to address both possibilities.

B. The Secretary's authority to write summary statements for initiative petitions is not assigned by the Constitution

The Secretary seems to suggest that her authority to write summary statements is found in the Constitution, yet she cites no provision imposing that duty upon her.[9] This is because no such provision exists. In fact, the Secretary is mentioned only twice in the various constitutional provisions relating to initiative petitions. Article III, section 50 states that initiative petitions proposing amendments to the constitution or proposing laws must be filed with the Secretary not less than six months before the election. This section does not even state what the Secretary does once such petitions are filed with her. The only other provision mentioning the Secretary is Article III, section 53, which states:

> The total vote for governor at the general election last preceding the filing of any initiative or referendum petition shall be used to determine the number of legal voters necessary to sign the petition. In submitting the same to the people the secretary of state and all other officers shall be governed by general laws.

[9] State's Br. at 27-35. The Secretary includes in her list of constitutional provisions article XII, section 2(b), a provision that not only fails to mention the Secretary, but also only applies to amendments to the constitution. State's Br. at 29. This case is about an initiative petition to enact/amend statutes.

This provision implies that the Secretary has some role in submitting initiative petitions to the voters, but that is governed by statutes. Article IV, section 14 is the general provision for the Secretary and provides, in relevant part:

> . . . [The Secretary] shall be custodian of such records, and documents and perform such duties in relation thereto, *and in relation to elections and corporations, as provided by law*. . .

(Emphasis supplied). Contrary to the Secretary's assertion that this provision makes her "chief elections officer of the state" (State Br. at 33), the Secretary's authority as to elections is as provided by law. This provision allows the legislature to impose duties upon her related to elections. This provision does not, however, give her any duties as regards preparing summary statements for initiative petitions. That simply is not in the language. The first type of separation of powers violation simply cannot exist as regards a court's rewriting of the summary statement because the duty is not assigned to the Secretary by the constitution.

C. The authority for the Secretary to prepare summary statements for initiative petitions is granted by statute

Subsection 1 of section 116.334 states in pertinent part:

> If the petition form is approved, the secretary of state shall within ten days prepare and transmit to the attorney general a summary statement of the measure which shall be a concise statement not exceeding one hundred words. This statement shall be in the form of a question using language

neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

No one in this case disputes that the Secretary's summary statement must also be neither "insufficient nor unfair." § 116.190. As such, the power that she has been given by the legislature is to write a summary statement that is not intentionally argumentative, not prejudicial, not insufficient and not unfair. As long as the Secretary exercises any discretion given to her in exercising this power within these parameters, there is no other branch of government that interferes. It is only when she has been determined by a court to have exceeded her power,[10] and to have written a summary statement that is, as in this case, insufficient and unfair, that the legislature has authorized the judiciary to rewrite the summary statement.

D. The limitations on the trial court's authority to "rewrite" the summary statement as set forth in Court of Appeals cases remedies any possible encroachment upon the Secretary's power

If anything in section 116.190 can be interpreted to possibly encroach upon the Secretary's powers (assuming, for argument, that they are vested solely in her), it might be if the trial court completely rewrote the entire summary statement after finding it insufficient or unfair *and* went beyond correcting the summary statement to choose its own wording even in areas where the Secretary had used sufficient and fair language. To

[10] The Secretary does not dispute that a court can make this determination. State's Br. at 27-34.

the extent this may be a violation of separation of powers, the Court of Appeals has already remedied such a problem through its rulings.

Cures without Cloning, 259 S.W.3d at 83, acknowledges the Secretary's role and protects that role by making it abundantly clear that a trial court does not have the authority to completely rewrite a summary statement; it can only modify the original summary statement to the extent necessary to correct the insufficient and unfair portions. *MML I*, 303 S.W.3d 573, also stayed within these parameters, rewriting the summary statements only to correct the insufficiency or unfairness and going no further. The Court of Appeals has interpreted the trial court's authority in section 116.190 to be limited to rewriting the portion of the summary statement where the Secretary was determined to have exceeded her authority and thus any discretion that may be placed with her. Such an interpretation is consistent with the statutory language while also protecting the discretion of the Secretary – so long as she exercises it properly.

The statutes do not give the Secretary the discretion to write an insufficient or unfair summary statement. She would exceed her authority in doing so and any discretion she is given is limited to the parameters of writing a summary statement that is not insufficient, unfair, or prejudicial. A court in no way invades any discretion placed in her when it corrects verbiage that exceeds the authority she is given. If *Cures* is ratified by this Court, then the authority granted a court by section 116.190 cannot be considered to be a violation of separation of powers, to the extent the power to write an initiative petition summary statement *is* solely entrusted to the Secretary by statute.

E. The Secretary's argument fails

As already set forth, a court rewriting only that portion necessary to cure the insufficiency or unfairness does not encroach upon any authority of the Secretary. The Secretary has exceeded her authority when she writes an insufficient or unfair summary statement and therefore the court's limited rewrite as under *Cures* cannot encroach upon her powers when that limited rewrite is to cure her acting in excess of her powers, not within them. This Court need only find that to the extent the separation of powers provision could be applicable to the Secretary's writing of a summary statement for an initiative petition, it would not be encroached upon by section 116.190 based upon the limited rewriting allowed by the *Cures* court and followed by the trial court in this case. The Secretary's Point II must be denied.

III. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED ON THE GROUNDS THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR AS A RESULT OF THE AUDITOR'S FAILURE TO CONSIDER LOCAL IMPACT OF THE PROPOSED MEASURE AS THAT BASIS FOR THE TRIAL COURT'S DECISION WAS NOT CHALLENGED BY THE STATE OR INTERVENORS AND THEREFORE HAS BEEN ABANDONED.

The trial court's Final Judgment found that the fiscal note and fiscal note summary were insufficient and unfair by understating the impact of the proposed measure for two reasons: "the Auditor's fiscal note and summary contained no analysis whatsoever of '510' lenders ***or*** local impact. App. A6 (emphasis supplied). (1) the failure of the Auditor to

calculate the impact to the state of proposed measure upon 510 Lenders; *and* (2) the failure of the Auditor to calculate and state the local impact of the proposed measure. The State and the Intervenor/Appellants have raised allegations of error only on the first basis (510 lenders). None of the Appellants have alleged that the trial court's Final Judgment is in error with respect to the local impact basis of the Final Judgment. There is no standard of review when an Appellant has failed to preserve an issue for appellate review. The issue is simply gone.

Rule 84.13 lays out the requirements for an Appellant to preserve error and raise it before an appellate court in a civil appeal. "[A]llegations of error not briefed or not properly briefed shall not be considered in any civil appeal..." Rule 84.13. Appellants provide no mention or argument that the fiscal note and fiscal note summary do properly include the local impact of the proposed measure. To wit, the State's Brief reads "The *only* issue is adequacy (or sufficiency) of the fiscal note due to the supposed lack of analysis on the issue of fiscal impact on the 510 lenders." State Br. at 18 (emphasis supplied).

This abandonment is particularly crucial in this case. Under section 116.190, the sole and exclusive remedy if a fiscal note and/or fiscal note summary is found to be insufficient and/or unfair is remand to the Auditor for a new fiscal note and fiscal note summary. § 116.190.4. In this case, even if the Appellants are correct that the 510 lender issue is not a sufficient basis for the trial court's determination of insufficiency and unfairness, they have abandoned the local impact basis of the Final Judgment and the fiscal note and fiscal note summary are still to be remanded to the Auditor.

Regardless of any determination of any other factor on appeal related to the fiscal note and fiscal note summary, Appellants cannot get past their abandonment of their claim of error regarding the local impact of the proposed measure. With respect to the trial court's Final Judgment on the fiscal note and fiscal note summary, Appellants' appeal should be dismissed or this Court should affirm the trial court's judgment finding the fiscal note and fiscal note summary insufficient and unfair and remanding the same to the Auditor under section 116.190.

The Western District of the Court of Appeals has looked at the effect of an Appellant who does not challenge all the bases for a trial court's judgment on appeal. In *Arch Ins. Co. v. Progressive Cas. Ins., Inc.*, 294 S.W.3d 520 (Mo. App. 2009), the Court was faced with an appeal that did not raise error with all the bases for the underlying judgment. The Court noted:

> While it may not be stated explicitly in Rule 84.04, the fundamental requirement for an appellate argument is that it demonstrate the erroneousness of the basis upon which a lower court or agency issued an adverse ruling.

Id. at 524. The Western District then "because of the patent deficiencies in Arch's Points Relied On and Argument" dismissed Arch's appeal. *Id*. This Court has similarly ruled that not attacking a particular part of a judgment would result in that part of the judgment being affirmed. *Ellis v. Farmer*, 287 S.W.2d 840, 852 (Mo. 1956).

In the current matter, the Appellants (both the State and Intervenors) have failed to challenge the trial court's decision that the fiscal note and fiscal note summary contained

no analysis of local impact and that the stated "costs" in the fiscal note and summary would have to increase if local impact were added to the note. In failing to challenge this point, their appeal of the portion of the Final Judgment declaring the fiscal note and fiscal note summary insufficient and unfair and remanding the same to the Auditor must be dismissed.[11] If not dismissed by this Court, then the decision of the trial court on the insufficiency and unfairness of the fiscal note and fiscal note summary should be affirmed.

[11] The Appellants might raise the issue their Reply Brief after reading this section. However, error first raised in a Reply Brief is not preserved for review and this Court will not entertain such late raised, new challenges to the judgment. *See Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

IV. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE EVIDENCE OF FISCAL IMPACT PRESENTED AT TRIAL WAS ACCEPTABLE IN THAT THE CITIZEN/PLAINTIFFS MUST HAVE A FORUM TO MAKE A FULL EVIDENTIARY RECORD ON THE INSUFFICIENCY AND UNFAIRNESS OF A FISCAL NOTE AND FISCAL NOTE SUMMARY BECAUSE SECTION 116.190 EXPRESSLY PROVIDES FOR SUCH A RECORD AND NO PROVISION OF THE CONSTITUTION OR STATUTES OR ANY VALID PUBLIC POLICY BARS OR LIMITS THAT EVIDENTIARY RECORD AT TRIAL OR REQUIRES PRIOR SUBMISSION OF THAT EVIDENCE TO THE STATE AUDITOR. (RESPONDS TO STATE'S BRIEF POINT III AND BRYAN'S BRIEF POINT I)

The State Defendants and Bryan claim that in ensuring the integrity of ballot titles in Section 116.190 challenges, the trial court must deny the right of citizen-plaintiffs to put on evidence of fiscal impact if that same evidence was not placed in a submission by "proponents" or "opponents" before the 10-day deadline for them to comment under section 116.175.1. First, the State Defendants have failed to preserve their argument. Second, it is incorrect as a matter of law.

A. Appellants failed to preserve this issue by timely objecting at trial

The State Defendants have failed to preserve this issue for appeal by failing to object to such evidence at trial. The only objections made to Dr. Durkin's testimony were

on the basis that his opinion lacked foundation and he was testifying on matters of law, which the court subsequently overruled. Tr. 201:9-20. No objections were made on the basis that the evidence presented by Dr. Durkin at trial was improper or barred because it was not submitted to the Auditor under section 116.175. Such objection was waived by the Auditor at trial and was not properly preserved for appeal. As a result such arguments must be rejected as not properly before this Court. *See, e.g., Fleshner v. Pepose Vision Institute, P.C.,* 304 S.W.3d 81, 97 (Mo. banc 2010); *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 187 (Mo. banc 2009); *State v. Johnson*, 207 S.W.3d 24, 31 (Mo. banc 2006).

B. The controlling statutes contain no express or implied prohibition on the circuit court's receipt or consideration of evidence of the fiscal impact of a proposed ballot measure

The plain language of the statute is clear: "*Any* citizen who wishes to challenge the...fiscal note...may bring an action in the circuit court of Cole County." § 116.175.1 (emphasis supplied). The petition is only required to "state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and...request a different fiscal note or fiscal note summary [.]" The court is directed to "consider the petition [and] hear arguments." § 116.190.4. This Court has consistently found that, in the absence of ambiguity, the plain language of a statute is controlling. *See, e.g., Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). No further analysis is necessary, as the plain language of section 116.190, does *NOT* require pre-filing of comments with the Auditor in order to maintain a suit challenging the fiscal note

and fiscal note summary.

1. The Auditor's duties

The Auditor must comply with three core requirements that are mandatory and central to his function, along with several other procedural guidelines.

First, the Auditor "shall assess the fiscal impact of the proposed measure." § 116.175.1. This means that regardless of the process used by the Auditor, his finished product must constitute an "assessment," it must address "fiscal impact," and it must relate to the "proposed measure."

Second, the Auditor "shall prepare a fiscal note and a fiscal note summary," and they "shall state the measure's estimated cost or savings, if any, to state and local governmental entities." § 116.175.2. Again, regardless of the process the Auditor uses, his end product must meet these criteria: it must be a "fiscal note" and a "fiscal note summary," it must be a "statement" and an "estimate" of "costs or savings" (if any), and it must address state and local government entities.

Third, the Auditor's summary "shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure." § 116.175.3. Neither the summary nor the underlying fiscal note may be "insufficient" or "unfair." § 116.190.3. This third requirement has engendered the most litigation, but the decisions agreed long ago that the ordinary meaning of these terms are that the summary and note cannot be (1) "inadequate; especially lacking adequate power, capacity, or competence" or (2) "marked by injustice, partiality, or deception." *See Missourians Against Human Cloning*, 190 S.W.3d 451 at 456 (citing plain meaning of "insufficient"

and "unfair").

The only other requirements are procedural: the fiscal note summary may not exceed fifty words, excluding articles (§ 116.175.3); any proponents or opponents "may" submit a "proposed statement of fiscal impact" to the Auditor provided that they do so within ten days of the Auditor's receipt of the measure (§ 116.175.1); the Auditor must finish his fiscal note and summary and send it to the Attorney General for approval within twenty days after receiving the petition (§ 116.175.2); and the Attorney General has ten days to review and "approve the legal content and form" of the fiscal note summary (§ 116.175.4). Finally, the Auditor "may consult with" state or local entities or "others with knowledge pertinent to the cost of the proposal." § 116.175.1.

Nowhere do the statutes provide that the Auditor is excused from rendering a sufficient or fair note or summary because no person qualifying as a "proponent" or "opponent" came forward to submit a qualifying "statement of fiscal impact" within ten days. Nor do the statutes provide that the Auditor can avoid his duty to render a fair and sufficient statement of the fiscal impact of the measure, addressing both state and local entities, merely by choosing not to contact (or by making little or no effort to contact) those with "pertinent" knowledge. While the statutes provide helpful guidance about the sources the Auditor might choose to mine, they do not make those contacts conditions precedent to his duty to comply with the three bedrock requirements of sections 116.175 and 116.190. By the same token, of course, they do not allow the Auditor to dilute the requirements of his bedrock duties simply by "dumbing down" his inquiry and limiting his sources of information.

2. The court's duties

The court's duty is also clearly articulated in the statutes.

First, it is to entertain a civil action filed by "any citizen who wishes to challenge the official ballot title or the fiscal note," so long as it is filed within ten days of the ballot title's certification by the Secretary. § 116.190.1.

Second, it is to place the action "at the top of the civil docket." § 116.190.4.

Third, it "shall consider the petition, hear arguments, and in its decision, either certify the fiscal note or the fiscal note summary portion of the official ballot title to the secretary of state or remand the fiscal note or the fiscal note summary to the auditor for preparation of a new fiscal note or fiscal note summary…" § 116.190.4.

Section 116.190 provides no restriction whatsoever on the circuit court's receipt of evidence or on the factual record litigants may provide for the court's consideration. Nor does the statute require that the court limit its review to the materials—however limited—the Auditor either took the time to find or chose to receive. In short, the controlling statutes contain no explicit or implicit requirement that the circuit court's review be artificially limited to the materials the Auditor happens to gather.

3. The absence of a pre-filing requirement was the result of a deliberate legislative choice that should not be reversed by this Court

The General Assembly, when enacting the provisions of section 116.190 in 1980, could have written the statute to either bar opponents that did not submit statements of proposed fiscal impact to the Auditor from challenging the fiscal note, or to bar

opponents from raising any issues or presenting any evidence that was not presented to the Auditor under section 116.175. It did not do so. Indeed, it gave *any* citizen the right to file a legal challenge, not just proponents or opponents who could have submitted comments. While the State and Bryan may desire amendments to section 116.190, the plain language of section 116.190 is clear and neither requires fiscal note challengers to have submitted proposed statements of fiscal impact to the Auditor nor bars the court from hearing such evidence at trial.

The experience of Oregon provides an instructive contrast. There, the legislature made the type of change that the State and Intervenor-Appellants have suggested. Prior to 1985, ORS 250.085 was very similar to section 116.190; however, in 1985 Oregon changed its ballot title challenge statute to read:

> (2) Any person dissatisfied with the ballot title for an initiated or referred measure certified by the Attorney General *and who timely submitted written comments on the draft ballot title* may petition the Supreme Court seeking a different title...
>
> ...
>
> (5) When reviewing a title prepared by the Attorney General or by the Legislative Assembly, *the court shall not consider arguments concerning the ballot title not presented in writing to the Secretary of State*...

ORS 250.085 (emphasis supplied). The Oregon Supreme Court explained the import of these changes:

> [S]ubsections (2) and (5) of ORS 250.085 were added to Oregon statutes

> [in 1995]. The purpose of these new provisions, as evinced by their language, was to remove from the judiciary and concentrate in the administrative branch the process of arriving at an appropriate title for ballot measures. In order to accomplish this purpose, the legislature requires something more than mere participation in the comment process in order to maintain a later challenge to a ballot title in this court.

Kafoury v. Roberts, 736 P.2d 179, 181 (Or. banc 1987). The Oregon legislature amended their ballot title challenge statute to "avoid the possibility of a person's intentionally waiting until the matter is before this court to raise meritorious objections that could have been raised and resolved at the administrative level." *Id*. at 181-182. It is clear that the State and Bryan desire that Missouri's legislature do the same as Oregon. Unfortunately for the State and Bryan, this court cannot compel them to do so, and is constrained by the plain language of the statute.

4. The Auditor himself fails to follow the plain language of section 116.175 that he insists be used to bar Missouri citizens from seeking judicial relief

The State's argument is further weakened by the admission of the Auditor's Office that not even they follow section 116.175, or the regulation promulgated thereunder. At the very least, it is disingenuous for the Auditor to use the plain language of section 116.175, in an attempt to bar citizens from bringing forth information that may be of importance to voters despite it being past the statutory ten day deadline, when the Auditor doesn't adhere to the statutory deadline.

The Auditor admits that he ignores the ten-day deadline found in section 116.175. Pl. Ex. 9 at 15. The Auditor believes "[t]here is no requirement [in section 116.175] that says that if it comes in after that point, it cannot be included [in the fiscal note]." *Id.* Similarly, in section 116.190, there is no requirement that if information comes in after that point, or after the preparation of the fiscal note, that it cannot be evidence at trial.

C. Appellants confuse the Court of Appeals' limited holdings regarding the sufficiency of the Auditor's discretionary process with the question of whether the end result of that process is sufficient and fair under section 116.190

Both the State Appellants' and Bryan's analysis incorrectly assumes that the Auditor's unwritten two-step process of (1) pasting submissions verbatim into the fiscal note, and then (2) summarizing those submissions, has been blessed for all time by two court of appeals decisions. This "process" appears nowhere in the statutes, and Appellants seriously misread the applicable case law.

In practice, the Auditor's office uses a single employee to do any substantive work in preparing fiscal notes and summaries, and no one checks that employee's assumptions or calculations (if any). Tr. 15:17-24. The Auditor is unaware of why the Auditor's office long ago decided to simply paste submitters' responses into the fiscal note verbatim, "no matter what they say." Tr. 21:4-25. When receiving submissions from proponents or opponents, the Auditor performs only a perfunctory review to make sure no pages or numbers are missing and to ensure the submission relates to the petition and is therefore "reasonable." Tr. 80:10-24. The Auditor's office does not follow the rules it

promulgated for such submissions. Tr. 14:1-25. The Auditor uses subjective judgment in deciding whether to follow up on a response. *See* Tr. 74:20-75:13.

As the Auditor now openly admits, this process "does not at any point require the Auditor to summarize or explain his analysis," (State Br. at 33), and indeed, does not even require the Auditor to perform "his own independent analysis" at all. State Br. at 40. *See also* Tr. 95:16-20 (The Auditor did not do "any independent analysis" in preparing "the actual wording for the fiscal note summary."). Instead, the Auditor simply decides to "summarize" the points he "believe[s] are important for the public." Tr. 84:11-13. Nonetheless, Appellants argue that fiscal notes and summaries that follow this "process" are immune from attack.

This reasoning misapplies the holdings of the court of appeals cases. *See MML I*; *Missouri Municipal League v. Carnahan*, 2011 WL 3925612 (Mo. App. 2011) ("*MML II*"). The latter case, *MML II*, merely held that the Auditor did not need to promulgate his fiscal note procedures (such as they were) as rules. In *MML I*, the court accepted as true that the Auditor performed a three-step process:

(1) placing entities' responses in the fiscal note if they are reasonable and complete;

(2) obtaining clarification from the entity if the responses are unclear; and

(3) if responses are unreasonable, placing less weight on the response in the fiscal note summary.

Id. at 582. The court merely held that section 116.175 "does not mandate that the Auditor

adopt *another method of independently assessing* the costs or saving of the proposal." *Id*. (emphasis supplied). The court did *not* hold that every time the Auditor undertakes this three-step process, its result must be deemed sufficient or fair under section 116.190, or that reviewing courts cannot look to the true facts regarding a proposal's fiscal impact in deciding whether the Auditor's work product is "sufficient and fair." Indeed, even after disposing of the attack on the Auditor's process, the court apparently examined the record, finding that "there is nothing in the record indicating the public will be misinformed of the fiscal impact" of the proposals. *Id*.

Further, it is significant that the court seemed to believe that the Auditor nonetheless "independently assess[es]" the costs or savings of the proposal. *Id.* at 582. As discussed above, however, the facts of this case are different: The Auditor admitted that he had made no independent analysis. Even after talking to the entity that failed to include "510" information, in contrast to the entity's internal document transmitted to the Auditor by Dr. Haslag, the Auditor made no effort whatsoever to address "510" lenders. Whatever the merits of *MML I* and *II* in interpreting section 116.175, this case presents far different facts, and as the trial court found, those facts indicate that the fiscal note and summary are insufficient and unfair under section 116.190.

D. If the Constitution requires any particular construction of section 116.190, it is to allow the compilation of a full record in the circuit court

If the Missouri Constitution has any application to the circuit court's judicial review of the Auditor's fiscal note decision under section 116.190, it should be to allow

citizen-challengers to develop a full record. *See* MO. CONST. art. V, § 18. "All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record." *Id*.

Because there is no opportunity for a hearing before the Auditor, and only "opponents" and "proponents" have a right to make submissions, plaintiffs who merely have an interest in an accurate fiscal note and ballot title would be completely frozen out of the process if they have no chance to develop a record before the circuit court. The statute makes clear that *any* citizen may bring suit, not just proponents or opponents. For a variety of reasons, allowing citizen-plaintiffs to fully develop the record before the circuit court is the fairest rule.

V. THE TRIAL COURT CORRECTLY FOUND THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE GROUNDS THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY DID NOT INCLUDE ANY OF THE FISCAL IMPACT ON 510 LENDERS. (RESPONDS TO STATE'S BRIEF POINT IV)

The Trial Court correctly found that the Auditor did not consider and include in the fiscal note the effect of the initiative petition on 510 lenders. The state claims that

this is not *factually* accurate. The State bears a heavy burden to show that the trial court erred based on fact issues.

A. The standard of review is *de novo* for questions of law and *deference* to the trial court on contested issues of fact

The determination of the court as to whether Auditor's Fiscal Note and Fiscal Note Summary were insufficient or unfair was, in part, a determination of contested fact. Evidence is contested when one "dispute[s] a fact in any matter." *White*, 321 S.W.3d at 308. A factual issue is contested when party presents contradictory or contrary evidence, through cross-examination, through pointing out internal inconsistencies in the evidence. *Id.* The role of the appellate court is not to "re-evaluate testimony through its own perspective" but rather, the court "confines" itself to the standard set forth in *Murphy v. Carron*. *Id* at 309. "Appellate courts defer to the trial court on factual issues 'because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *Id.* at 308-09 (quoting *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). In addition, fact issues without specific findings in the judgment are considered on appeal as being have found in accordance with the result reached (here that the fiscal note and fiscal note summary are insufficient) and this court will affirm the trial court's judgment if it is correct on any reasonable theory supported by the evidence. *Safeco Ins. Co. of America v. Stone & Sons, Inc.*, 822 S.W.2d 565 (Mo. App. 1992).

The trial court found that both Drs. Haslag and Durkin were "well qualified and highly credible" and "experts in the field of economics." App. A5. The court found they "relied on facts and data reasonably relied upon by experts in their fields, and the facts and data upon which they relied were otherwise reasonably reliable." *Id.* The court found that the Auditor accepted the analysis of Dr. Haslag as factual. App. A6. The court found the Auditor's fiscal note "acknowledges" a negative impact on 510 lenders, but did not include any analysis of the impact in the fiscal note. *Id.* The court found that Dr. Durkin's testimony provided the fiscal impact on state revenues based on the proposed measure's impact on 510 lenders. *Id.* The court found that the Auditor admitted the fiscal note and summary did not include the impact on 510 lenders or on local government entities and the inclusion of such would increase the (negative) fiscal impact to the state. *Id.* While the trial court states that many of these facts are "undisputed" such facts were still "contested" as described in *White,* and therefore this Court should defer to the trial court's determination of such facts.

B. The omission of impact on 510 lenders from the fiscal note and fiscal note summary

The State claims that the trial court erred in finding that there had been a complete omission of any fiscal impact on 510 lenders in the fiscal note and fiscal note summary because "there was evidence that the submission of [the Department] reflected its analysis as to the effect on 510 lenders" and the Department response was included verbatim in the fiscal note. State Br. at 43. Contrary to Appellants assertions, the record unequivocally supports the trial court's finding.

The State admits that the contents of Division of Finance estimate of fiscal impact were not included in the fiscal note. The State indicates that such estimates were not included in the official response from the Department that is the parent body of the Division of Finance, which was included verbatim in the fiscal note. *Id.* at 45. The State justifies this by pointing to the Auditor's testimony that the Division's estimates were "incorporated" into the estimate of the Department that there would "no cost or savings to the Department." *Id.* at 45; Tr. 89. The Auditor testified that the following statement of Department includes the Division of Finance's estimated $675,000 loss:

> If the adoption of the measure results in a reduction of fee revenue from consumer credit entities, the department anticipates it would expend a correspondingly smaller amount to regulate these entities.

Tr. 27-28, 89. According to the Auditor, the Department's response that there is "no cost or savings to the Department" means that the amount of fee revenue lost by business closures must equal the savings generated by decreasing regulatory staff. Tr. 27-28, 89. While the State claims Plaintiff failed to show that this conclusion was unreasonable, Plaintiff showed that the conclusion was mere speculation by the Auditor and was unsupportable based on calculations by Dr. Haslag.

The Auditor testified he was only *speculating* as to whether the Division of Finance's estimated effect on 510 lenders was included in the Department estimate. Tr. 28: 12-14. He claimed the two were "talking about the same revenues," but when pressed, confessed that he was not sure and that he did not speak with the Division or

Department or look at any documentation in an attempt to clarify what was included in the Department estimate. Tr. 28:2-14.

The Division of Finance indicated that the closing of payday, title and some 510 lenders would result in a loss of $675,000. They indicate an estimated savings to the Department on account of decreasing the consumer credit examination staff by 4 or 5 examiners. LF 3. Dr. Haslag testified that even assuming the Division let go the five highest paid grade 3 examiners, it would only total $487,500, and be nearly $200,000 short of being a "wash" as suggested by the Auditor. Tr. 140-44. Basic math and the testimony at trial show that the Department's response did not incorporate the impact on 510 lenders that the Division of Finance had at one time indicated.

C. The Auditor's duties in light of the *MML* cases

The State suggests that the only thing the Auditor failed to do was an "independent assessment" of 510 lenders and asserts that the Auditor is not required to do any independent assessment, citing *MML I.* The State also claims that the trial court misapplied the law since the court's finding would require any independent analysis by the Auditor. To the contrary – the trial court "acknowledge[d]" the Auditor's argument relating to the validity of the procedures used by the Auditor in preparing fiscal notes as upheld in *MML I.* The court correctly held:

> [A]lthough the Auditor did comply with the general procedures approved in MML, this alone does not shield his work from being found insufficient.

App. A7 n.1. While the Auditor could have used any number of procedures to "assess the fiscal impact of the proposed measure," in the end, he is still required to comply with

sections 116.175 and 116.190. Put another way, the Auditor's reliance on previously-approved procedures does not answer the question of whether, in this case, those procedures actually yielded an accurate, adequate, and fair result. In this case, the trial court found that the fiscal note and fiscal note summary were insufficient and unfair based on the Auditor's omission of any fiscal impact the proposed measure would have on 510 lenders.

1. The limits of the Auditor's "discretion" under section 116.175 after the *MML* cases

Current Missouri case law gives the Auditor substantial discretion in the method of preparing fiscal assessments under section 116.175. Further, a fiscal note does not need to contain "actual amounts" of estimated costs so long as they at least characterize them correctly-for example, as "significant." MML II, 2011 WL 3925612 *7.

These holdings do not answer the specific claims Plaintiff has brought here. That is because no Missouri case allows the Auditor to use this discretion in employing certain procedures to excuse substantive flaws in a given fiscal note or summary. In other words, the Auditor cannot avoid attack for actual mistakes and inaccuracies in the assessment merely because he followed an approved method in a given case.

By basing his defense in this case on his mere claim to have used an "approved" method, the Auditor invites the Court to ignore actual, palpable mistakes in the note and summary. The Auditor's representative demonstrated the absurdity of his position at trial. He stated that "no matter what the response" of the state and local government entities that he would include it verbatim in the fiscal note. Tr. 21:19-25. When asked if a

submission stated that the proposed measure "will cause cats and dogs to sleep together" if he would include it, he indicated he would. Tr. 22:1-4. When defending this irrelevant and blatant error, the Auditor would then hide behind the *MML* cases, arguing that he "followed the approved procedures." No case has ever gone this far. To follow the Auditor down this path would be error. It would also remove the last conceivable restraint on the Auditor's conduct and render meaningless and unenforceable the requirements of "sufficiency" and "fairness" in section 116.190. Instead, the Court should look to the undisputed evidence to determine whether the fiscal note and summary are adequate, accurate, and fair.

2. Current statutory requirements

The Auditor "shall *assess* the fiscal impact of the proposed measure" § 116.175. The term "assess" has a plain meaning: "to determine the rate or amount of." WEBSTER'S' THIRD NEW INTERNATIONAL DICTIONARY, 131 (2002). "Determine" means "to fix conclusively or authoritatively." *Id.* at 616. So the Auditor must fix conclusively or authoritatively the amount of fiscal impact of the proposed measure. That "assessment" cannot be "unfair" or "insufficient." § 116.190. The language the Auditor uses cannot be "argumentative" or "likely to create prejudice for or against the proposed measure." § 116.175.3.

A recent Western District case found that the Auditor's current method of preparing this assessment is "adequate." *MML I*, 303 S.W.3d at 582. This method involves, generally, the following actions:

(1) placing entities' responses in the fiscal note if they are reasonable and

complete;

(2) obtaining clarification from the entity if the responses are unclear; and

(3) if responses are unreasonable, placing less weight on the response in the fiscal note summary.

Id. The Auditor's office continues follow these procedures. Tr. 19-21.

3. *MML I* and *MML II* separate the question of the adequacy of the process from the accuracy and adequacy of the result; only the latter is at issue here

MML I and *MML II* do hold that the Auditor cannot be attacked merely because he decides to use the office's established process. However, they do not hold that using this process excuses actual inaccuracies and errors in the fiscal note or summary. Indeed, both decisions follow the same pattern. They first dispose of arguments the plaintiff had made about procedural requirements the Auditor was supposed to follow. They then separately determine whether actual work product by the Auditor is inadequate or inaccurate. Neither case deals with the situation posed here: actual factual errors in the fiscal note and fiscal note summary.

VI. THE TRIAL COURT DID NOT ERR IN RULING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR ON THE BASIS THAT PLAINTIFF'S EVIDENCE DID NOT SPECIFICALLY IDENTIFY LENDERS AFFECTED BY THE BALLOT INITIATIVE WHO WERE NOT ALREADY CONSIDERED IN THE FISCAL NOTE OR FISCAL NOTE SUMMARY. (RESPONDS TO STATE'S BRIEF POINT V)

Appellants argue that there was some type of confusion or ignorance of 510 lenders; however, the Auditor's own witness was not confused as to what 510 lenders are. Further, the testimony of multiple witnesses addressed, without objection, what 510 lenders entail. All of the witnesses further testified that the 510 lender impact was not calculated. Thus regardless of which specific types of 510 lenders were excluded from the fiscal note or fiscal note summary or the exact percentage of 510 lenders that do not offer payday or title loans, the undisputed evidence makes clear that the proposed measure would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. This Court should defer to the trial courts evidentiary determinations. The evidence shows that the fiscal note and fiscal note summary did not include any negative impact associated with the effects on 510 lenders and thus the fiscal note and fiscal note summary were insufficient and unfair, as the trial court properly held. The discussion of the Standard of Review for Point 1 is incorporated by reference here. This Court defers to factual findings.

The Auditor has claimed that there is "no way to know" whether or not fiscal impact information on any 510 lenders was excluded from the fiscal note or fiscal note summary. The way to know is by examining the record made at trial. The evidence at trial showed that 510 lenders would be impacted by the proposed measure, that the Auditor relied on an analysis that did not include 510 lenders, that the fiscal note and fiscal note summary did not include any potential impact to 510 lenders, and that inclusion of the impact on 510 lenders would have increased the negative impact to state and local governments.

The State unexplainably claims that nothing in the record established that the judge, witnesses, and attorneys agreed on a common definition of "510" lenders. This is a red herring. The statute itself was offered at trial and the Court took judicial notice of it. Tr. 218-19; Pl. Ex. 6. The plain language of the statute refers to "consumer installment lender[s]." The record reflects that all parties involved understood the meaning of "510 lenders." Tr. 35:21-25; Tr. 61:9-11; Tr. 178:25, 179:1-10.

The State claims that the trial court erred because (1) Plaintiffs' expert did not specify a type of 510 lender that would be affected by the proposed measure that was not included in the fiscal note, and (2) there was no testimony as to what percentage of 510 lenders do not also provide payday or title loans. These specifics are immaterial to the ultimate question of whether the fiscal note or fiscal note summary is insufficient. The record supports the following facts (1) 510 lenders would be affected by the proposed measure, (2) the Auditor relied on Haslag's analysis which did not include any potential impact to 510 lenders, (3) the Fiscal Note and Fiscal Note Summary did not include any

impact on 510 lenders, and (4) the inclusion of the impact of 510 lenders would have increased the negative impact to state and local governments. The record also indicates that Department's analysis does not include 510 lenders.

The Auditor testified that the proposed measure would cause businesses to close. Tr. 30: 7-12. He also testified that in formulating the fiscal note, he relied on the analysis of Dr. Haslag. The record shows that Dr. Haslag's estimates included information on the effects of closures of payday lenders and title lenders. Tr. 35:15-20. The record shows that Dr. Haslag's estimates did not include any analysis based on the closure of 510 (installment) lenders. Tr. 36:1-5; 61:2-4; Tr. 131:4-14; 137:1-3. The Auditor testified that the fiscal note and fiscal note summary failed to contain any analysis as to the impact upon installment (510) lenders. Tr. 61:25, 62:1-3.

Dr. Haslag testified that if the fiscal impact from the 510 lenders had been included, it would increase the negative impact to both the state and local government entities. Tr. 152:1-10. Dr. Durkin concurred with the Auditor and Dr. Haslag, testifying that neither the fiscal note nor the fiscal note summary included the proposed measure's impact of 510 lenders and the resulting negative impact on state or local government entities. Tr. 204:8-16.

The Auditor attempts to save the fiscal note and fiscal note summary by pointing out that his corporate designee testified the submission of the Department does reflect its analysis as to the effect on 510 lenders. Although the trial court apparently disagreed with this take on the evidence, it also mischaracterizes what happened at trial. The Auditor's designee was only *speculating* as to whether the Division of Finance's estimated effect on

510 lenders was included in the Department estimate. Tr. 28: 12-14. He claimed the two were "talking about the same revenues," but when pressed, confessed that he was not sure and that he did not speak with the Division or Department or look at any documentation in an attempt to clarify what was included in the Department estimate. Tr. 28:2-14. The Department indicated "no costs or savings to the Department." Jt. Ex. 3. The Division of Finance suggested a significant loss in revenue as a result of 510 (and other) lenders going out of business. *Id.* If the Department had included the costs indicated by the Division of Finance, then its conclusion would not have been "no costs or savings to the Department."

Dr. Durkin testified that the 510 industry would shut down as a result of the proposed measure. Pl. Ex. 14. The loss of these consumer installment loans, would result in the following fiscal impacts (1) reduce state sales tax revenues in year 1 and 2 by $5.44 million, (2) reduce income tax revenues by $1.2 million in year 1, (3) reduce state sales tax revenues from former employees due to belt tightening by $.845 million, (4) increase unemployment compensation by $6.6 million, and (5) reduce business income tax revenues by $.504 million. Trial Exhibit 14, Tr. 189-197. As a result of the proposed measure's impact on 510 lenders, the total negative impact in year 1 would be $14.589 million and in year 2, $5.944 million. Trial Exhibit 14, Tr. 189-197. None of this was included in the fiscal note or fiscal note summary.

Regardless of which specific types of 510 lenders were excluded from the fiscal note or fiscal note summary or the exact percentage of 510 lenders that do not offer payday or title loans, the undisputed evidence makes clear that the proposed measure

would impact at least some 510 lenders which would result in negative impacts to both the state and local governments. The evidence shows that the fiscal note and fiscal note summary did not include any negative impact associated with the effects on 510 lenders.

VII. THERE ARE NUMEROUS ALTERNATIVE GROUNDS UPON WHICH THIS COURT SHOULD AFFIRM THE TRIAL COURT'S FINDING THAT THE FISCAL NOTE AND FISCAL NOTE SUMMARY ARE INSUFFICIENT AND UNFAIR.

The Trial Court's decision should be affirmed on the grounds as described above; in addition, the trial court's decision with regard to the insufficiency of the fiscal note and summary can be affirmed on any one of the following alternative grounds: that the fiscal note and fiscal note summary (1) failed to state an amount for local government losses when such amount was certain (2) failed to include costs related to unemployment insurance; (3) failed to include costs related to loss of local tax revenue; and (4) fail on basic math. As this court has explained:

> This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground.

Missouri Soybean Ass'n v. Missouri Clean Water Com'n, 102 S.W.3d 10, 22 (Mo. banc 2003). See also *Goerlitz v. City of Maryville,* 333 S.W.3d 450 (Mo. banc 2011). The

following grounds for affirmance were not relied on by the trial court, but are supported by the record.

A. The Fiscal Note Summary falsely states that local government losses "could" not occur or are uncertain

The Auditor admitted — and both experts agreed — that local government losses were certain to occur. Tr. 68-69, 147-48, 198-200. Even after receiving obviously incomplete or inconsistent responses from cities, some of which indicated that there would be no fiscal impact from the closure of businesses, the Auditor did nothing to follow up with or obtain clarification from even one local political subdivision. Tr. 73-74.

Against this evidentiary background, the Auditor summarized the local impact as follows: "Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures." Jt. Ex. 3.

This statement is flawed in numerous respects. First, the statement avers that cities "could" lose license revenue "if" there were business closures. But the Auditor admitted that closures "would" occur. Tr. 30. This testimony would justify the Court's remand to the Auditor for a new fiscal note.

Second, the Auditor refused to include the data he did receive. Losses of at least $122,000 were certain, and that was based on Dr. Haslag's information from only two cities. The omission of this certain (albeit incomplete) information makes the inevitable resulting closures and resulting losses appear somehow uncertain. It is undisputed that

such closures are certain. Thus the fiscal note and fiscal note summary are insufficient and unfair.

B. The Fiscal Note Summary excludes costs related to unemployment insurance

Although the Auditor admitted every portion of Dr. Haslag's unemployment insurance analysis, his summary fails to even mention the substantial anticipated payouts because of his view that the unemployment compensation fund is not general revenue of the state. Tr. 45-48. However, the Comprehensive Annual Financial Report of the State of Missouri shows that the fund is a state fund. Pl. Ex. 5, pp. 21-23. The Auditor ultimately provided no reason or authority for his view that a fund that is replenished by direct taxes on employers, and which admittedly would have to charge employers higher rates to recover for job losses anticipated under the initiative, does not include at least one facet of a fiscal impact. In contrast, Plaintiffs' experts, Dr. Haslag and Dr. Durkin, both testified that the taxing of employers into a special fund is a fiscal activity, and that outlays from that fund that will require higher taxes should be included in a fiscal impact statement. Tr. 130-35, 190-95.

Because he agreed that outlays of $8 million or $10 million would definitely have to be made from the unemployment fund (even without accounting for "510" lender closings), the Auditor should have somehow reflected this impact in his fiscal note summary. The most accurate and fair result would have been to simply include this amount in lost revenues (or costs) to the state. But in rejecting this format, the Auditor did not even consider other options such as indicating that $10 million would have to be

paid from the unemployment compensation fund, leaving readers to make the somewhat esoteric and irrelevant analysis as to whether they believe this fund has the same status as the general revenue fund. Alternatively, the Auditor could within a few seconds have performed Dr. Haslag's calculation, determining the loss in corporate income taxes derived from increased corporate payments into the fund to cover the increased outlays.

Regardless of the precise manner in which the "unemployment compensation" analysis in the fiscal note was reflected in the summary, it could not have been completely omitted. Once again, the Auditor erred on the side of understating the fiscal impact of the petition as shown in the fiscal note.

C. The Fiscal Note and Fiscal Note Summary exclude the loss of local tax revenue

The second sentence, addressing costs and savings to local government entities, does not even mention other kinds of local revenue losses from, for example, sales or earnings taxes. The first half of the fiscal note summary includes an analog based on statewide taxes and state revenue, but the bottom half of the summary ignores the existence of parallel taxes at the local level. As Dr. Durkin noted, those can be significant. The Auditor admitted that it was "clear" from Dr. Haslag's report that there would be a "local impact" Tr. 90. Dr. Haslag testified that there would be lost local license fee revenue. Tr. 147. The Auditor admitted there would be state income tax loss, and that he was aware of similar local level income (earnings taxes) but did not include this in the fiscal note or fiscal note summary. Tr. 53-54, 73, 86.

It is undisputed that the proposed measure would cause lost state sales tax revenue. Dr. Durkin testified there would be parallel losses in local sales tax revenue as a result of the proposed measure. Tr. 199-200. This testimony was confirmed by the Auditor, who stated there would be a "corresponding impact for local government sales tax revenue." Tr. 69:3-7.

The Auditor may respond that he did not have (and was not required to look for) data on local sales or earnings tax rates, but clearly, such uncertainty has not stopped the Auditor on other aspects of the summary. For example, the Auditor is comfortable referring to "unknown" losses even in cases where-as with local license fees-he actually has hard data. Because the fact of closures and the fact of tax losses at all levels is not in dispute, the summary should at least have included reference to local lost revenues other than license fees.

Any of these basis would require this Court to affirm the trial court because all the trial Court did was direct the Auditor to prepare a new fiscal note. This is all the statutes allow and any insufficiency requires a new note.

VIII. NO PART OF THE SUMMARY STATEMENT LITIGATION IMPACTS BRYAN'S CONSTITUTIONAL RIGHTS, AND BRYAN'S ARGUMENTS ARE UNRIPE AND UNDEVELOPED (RESPONDS TO BRYAN'S BRIEF POINT II.E)

Finally, almost as an afterthought, Bryan claims that the circuit court's judgment cannot stand because it "burdens" their constitutional right to engage in the petition

process. Bryan Br. at 59-60. This claim is meritless, but this Court need not (and should not) reach the merits because it is unripe: the validity of signatures gathered by Bryan is not at issue in this case, and will not be at issue until the Secretary certifies the number of valid signatures on the petition.

A lawsuit under section 116.190, merely decides whether the summary statement, fiscal note, and fiscal note summary are "sufficient" and "fair." If they are not, the trial court either certifies a new, corrected summary statement, or remands the fiscal note and fiscal note summary to the Auditor for a second try. § 116.190.4. There is no ruling on the validity of signatures, as all parties and the trial court acknowledged in the Second Amended Judgment: "The Court recognizes that those portions of Plaintiffs' prayers for relief seeking invalidation of signatures were withdrawn and were not tried." L.F. 209.

In section 116.200, the General Assembly has provided a separate statutory proceeding for the type of issue Bryan has belatedly raised, the validity of their signatures. But first, the Secretary has several tasks to complete. Under section 116.120, after a petition is submitted, the Secretary is to "examine the petition to determine whether it complies with the Constitution of Missouri and with this chapter." § 116.120.1. Among other things, the Secretary has authority not to count signatures "which are, in his opinion, forged or fraudulent signatures." § 116.140. The Secretary then issues a "certificate of sufficiency" or, if it is insufficient, "shall issue a certificate stating the reason for the insufficiency." § 116.150. The Secretary must issue the appropriate certificate no later than the thirteenth Tuesday before the general election. § 116.150.3. The section 116.200 challenge to the Secretary's "sufficiency"

determination can be filed by "any citizen" in the Cole County Circuit Court "within ten days after certification is made," and the challenge must be decided "as quickly as possible." § 116.200.2.

Therefore, if any decision regarding the official ballot title will injure Bryan, several contingencies must occur. First, Bryan must turn out to have submitted a sufficient number of otherwise-valid signatures — something that no one will know until Bryan's signatures are verified, counted, and certified by the Secretary under the above-cited statutes. Second, the Secretary must make a determination that some or all of Bryan's signatures are invalid because the ballot title was adjudicated insufficient and unfair, and this determination must have rendered insufficient an otherwise-sufficient petition. Again, no one has any idea whether this will occur. If it does, the legislature has provided a clear statutory remedy and timeline: a section 116.200 proceeding, which can be brought by any citizen within ten days of the Secretary's decision. Accordingly, Bryan's constitutional argument is unripe.

There are other reasons not to take up Bryan's challenge. First, if it is an as-applied challenge to the application of section 116.190. Yet this argument was not presented o the Court below and cannot now be reviewed. Furthermore, there was no evidence presented to the Court below concerning the burden to Bryan or his injury.

For all of these reasons, this Court should not consider Intervenor-Appellant Bryan's belated effort to sketch a constitutional claim.

IX. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING SHULL AND STOCKMAN PERMISSIVE INTERVENTION (RESPONDS TO BRIEF OF SHULL AND STOCKMAN)

> The standard of review for denial of permissive intervention is abuse of discretion: "This Court must confine its review of permissive intervention under Rule 52.12(b) to considering whether the trial court's ruling was an abuse of discretion because it was "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."

Johnson v. State, SC92351, 2012 WL 1921640 at *6 (Mo., May 25, 2012)(quoting *State ex rel. Nixon v. Am. Tobacco Co.,* 34 S.W.3d 122, 131 (Mo. banc 2000)).

Under Rule 52.12(b), Shull's permissive intervention could only have come within the trial court's discretionary authority if their "claim or defense and the main action [had] a question of law or fact in common." But before the court's exercise of discretion even becomes relevant, there is a threshold issue: the existence of a prerequisite claim, defense, or interest under Rule 52.12(b)(2). As Shull now admits, they were at least required to show that they had a "claim, defense, or interest unique to themselves." Shull Br. at 29 (quoting *Comm. for Educ. Equality v. State ("CEC")*, 294 S.W.3d 477, 487 (Mo. banc 2009)). Permissive intervention "is inapplicable" where intervenors would "merely reassert[] the State's defenses." *Id.*

It is undisputed that Shull had no unique "claim" or "defense." Shull has never

pled a unique claim or defense (*Compare* Shull and Stockman's Answer, L.F. R 27; L.F. N 92, to Answer of Carnahan, L.F. R 38; L.F. N 68, and Answer of Schweich, L.F. R 31; L.F. N 77, which are more thorough and assert additional defenses neglected by Shull and Stockman). Instead, Shull and Stockman have placed all their eggs in one basket: their allegedly "unique interest" in the validity of their own signatures and the qualification of the petition for the ballot, which, in turn, they believe gives them a unique interest in the outcome of the challenge to the official ballot title as "insufficient" and "unfair." Shull Br. at 30. Permissive intervention is not appropriate unless a new defense is asserted. *Johnson*, SC92351, 2012 WL 1921640 at *6 (finding no abuse of discretion where the trial court could have concluded based on the facts that legislators had a personal interest in their own districts).

Although Shull admits that, barring any unique claim or defense, their permissive intervention argument hangs by the thread of "unique personal interest," the Court of Appeals finally and definitively severed that thread in its March 26, 2012, opinion. *See Prentzler v. Carnahan*, -- S.W.3d --, 2012 WL 985839 (Mo. App. W.D. Mar. 26, 2012) (no transfer or rehearing applied for or taken); *see also* L.F. 132. Because that decision is final, collateral estoppel bars the relitigation of Shull's "unique interest" under the "permissive intervention" heading. See *James v. Paul*, 49 S.W.3d 678 (Mo. banc 2001).

Undeterred by the final word of the Court of Appeals, Shull wrongly charges the trial court with "arbitrary indifference" to their unique personal interests as signers and supporters of the petition. They have forgotten or ignored the fact that the trial court *actually recognized the existence of that interest* (a decision specifically noted and

reversed by the Court of Appeals in its final and binding decision).[12]

Instead, the trial court based its decision on Shull's open admission that they would not present any unique claim or defense and would instead argue for the precise version of the ballot title already being defended by the State defendants. Rather than being "arbitrary" and "illogical," this decision followed this Court's most recent statements of Missouri law, which are themselves cited without argument in Shull' brief. See Shull Br. at 30; *Johnson*, SC92351, 2012 WL 1921640 at *6.

Most of Shull's argument is based upon their speculation that they would have prepared for trial and cross-examined witnesses more proficiently than the trial counsel for the Auditor and Secretary. Shull Br. at 33-34. Indeed, as *amici*, Shull had every opportunity to make legal arguments (and actually proffered oral argument and briefing on all of the issues, both legal and factual, Tr. 250-255), so their complaint can only be directed to the State Defendants' chosen method of contesting the evidence presented by the plaintiffs.

Collateral estoppel, Missouri law on permissive intervention, and common sense

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[12] The Court of Appeals "note[d] that the trial court stated that a 'citizen of this State who has differing political views…does have an interest in litigation concerning the Intiative.'" *Prentzler*, 2012 WL 985389 at *5. However, it explained that "construing the meaning of an interest for purposes of intervention as of right that broadly would completely eviscerate Rule 52.12(a)(2)" and would "open the floodgates to oppressive intervention…" *Id.* at *6.

all require that this Court turn back Shull's effort for yet another bite at the apple. The circuit court's exercise of discretion should be affirmed.

CONCLUSION

For all the foregoing reasons, Respondent Reuter respectfully request this Court to affirm the decision of the trial court as to the insufficiency and unfairness of the Secretary's Summary Statement and the Auditor's Fiscal Note and Fiscal Note Summary.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By: */s/ Charles W/ Hatfield*
Charles W. Hatfield, No. 40363
Khristine A. Heisinger, No. 42584
230 W. McCarty Street
Jefferson City, Missouri 65101
573-636-6263
573-636-6231 (fax)
chatfield@stinson.com
kheisinger@stinson.com

Attorneys for Respondent Reuter

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 15th day of June 2012, a true and correct copy of the foregoing brief was served on the following by eService of the eFiling System and a Microsoft® Office Word 2007 version was e-mailed to:

Jeremiah J. Morgan, No. 50387
Deputy Solicitor General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
Tel. 573.751.1800
Fax 573.751.0774
jeremiah.morgan@ago.mo.gov

Attorney for Appellant Missouri Secretary of State Robin Carnahan

Darrell Moore, No. 30444
Chief Litigation Counsel
Office of Missouri State Auditor
301 West High Street, Suite 880
Jefferson City, MO 65102
Tel. 573.751.5032
Fax 573.751.7984
Darrell.Moore@auditor.mo.gov

Ronald R. Holliger, No. 23359
General Counsel
Missouri Attorney General's Office
207 W. High Street
P.O. Box 899
Jefferson City, MO 65102-0899
Tel. 573.751.8828
Fax 573.751.0774
Ronald.Holliger@ago.mo.gov

Attorneys for Appellant Missouri State Auditor Thomas A. Schweich

Heidi Doerhoff Vollet, No. 49664
Dale C. Doerhoff, No. 22075
William E. Peterson, No. 63158
Cook, Vetter, Doerhoff & Landwehr P.C.
231 Madison Street
Jefferson City, MO 65101
Tel. 573.635.7977
Fax 573.635.7414
hvollet@cvdl.net
ddoerhoff@cvdl.net
wpeterson@cvdl.net

Attorneys for Appellants Bryan and Missourians for Responsible Lending

John Campbell, No. 59318
The Simon Law Firm
800 Market Street, Suite 1700
St. Louis, MO 63101
Tel. 314.241.2929
Fax 314.241.2029
jcampbell@simonlawpc.com

Dale K. Irwin, No. 24928
Slough Connealy Irwin & Madden LLC
1627 Main Street, Suite 900
Kansas City, MO 64108
Tel. 816.531.2224
Fax 816.531.2147
dirwin@scimlaw.com

Vanessa J. Carroll, *pro hac vice* (Served by 1st Class Mail and e-mail)
SOUTHERN POVERTY LAW CENTER
111 E. Capitol Street, Suite 280
Jackson, Mississippi 39201
601-948-8882 (telephone)
601-948-8885 (facsimile)
vanessa.carroll@splcenter.org

Counsel for Appellants Shull and Stockman

The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

(2) complies with the limitations in Rule 84.06(b) and contains 21,403 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2007; and

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/s/ Charles W. Hatfield
Attorney for Respondent Reuter